21143
EB

SERVICE DATE - MAY 27, 1998

SURFACE TRANSPORTATION BOARD[1]

DECISION

No. 41642

AQUA GULF TRANSPORT, INC.--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF SHUTTLE EXPRESS, INC.

Decided: May 21, 1998

We find that the collection of undercharges sought in this proceeding would be an unreasonable practice under 49 U.S.C. 10701(a) and section 2(e) of the Negotiated Rates Act of 1993, Pub. L. No. 103-180, 107 Stat. 2044 (NRA) (now codified at 49 U.S.C. 13711). Accordingly, we will not reach the other issues raised in this proceeding.

BACKGROUND

This matter arises out of a court action in the United States Bankruptcy Court for the Middle District of Florida, Orlando Division, in Shuttle Express Inc., Jerald I. Rosen Trustee, v. Aqua Gulf Transport, Inc., Case No: 92-06601-6C7, Adversary No. 94-329. The court proceeding was instituted by Jerald I. Rosen, Trustee on behalf of Shuttle Express, Inc. (Shuttle or respondent), a former motor common and contract carrier, to collect undercharges from Aqua Gulf Transport, Inc. (Aqua Gulf or petitioner). Shuttle seeks undercharges of $5,765.69 (plus interest) allegedly due, in addition to amounts previously paid, for services rendered in transporting 53 containerized shipments of sugar, paper products, and aluminum foil between March 30, 1992, and May 27, 1992. The shipments were transported from Savannah and Rincon, GA, and Orlando, FL, to Jacksonville, FL, for subsequent movement by ocean carrier.

---

[1] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the ICC Termination Act or the Act), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the Act provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the Act. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 13709-13711. While this decision generally applies the law in effect prior to the Act, new 49 U.S.C. 13711(g) provides that new section 13711 applies to cases pending as of January 1, 1996, and hence section 13711 will be applied to the factual situation presented in this proceeding. Unless otherwise indicated, citations are to the former sections of the statute.

By order filed August 21, 1995, the court stayed the proceeding and referred issues of contract carriage, rate reasonableness, and tariff applicability to the ICC for resolution.[2]

Pursuant to the court order, Aqua Gulf, on October 20, 1995, filed a petition for declaratory order requesting the ICC to resolve the court-referred issues. By decision served October 30, 1995, the ICC established a procedural schedule for the submission of evidence on non-rate reasonableness issues. On December 29, 1995, petitioner filed its opening statement. Respondent failed to submit a reply and indeed has failed to make an appearance or otherwise participate in any aspect of this proceeding.[3]

Petitioner contends that: (1) the subject shipments were transported pursuant to an arrangement for contract carrier service; (2) the tariff rates that respondent seeks to apply under Item 2300 of Tariff ICC SEER 200 do not apply to containerized cargo and are inapplicable; and (3) the tariff rates that respondent seeks to apply are unreasonable. Petitioner asserts that it entered into a transportation service agreement with respondent based on a written flat rate quotation provided by respondent; that it relied on the written rate quotation in tendering its traffic to respondent; that respondent invoiced petitioner for its services at the quoted flat rate; and that petitioner paid the freight invoices as presented. Petitioner further contends that respondent's efforts to collect undercharges constitute an unreasonable practice.

Petitioner supports its contentions with an affidavit from Matthew Shaw, Shuttle's Operations Manager in Jacksonville during the involved period, and verified statements from John Bruno, President of Aqua Gulf, and Anthony Damelio, Aqua Gulf Director of Logistics. Mr. Shaw states that he was responsible for the solicitation of business in the Jacksonville area and was authorized to provide rate quotations for freight movements to or from points in northeastern Florida. He asserts that in March 1992, he provided petitioner with a written rate quotation of $285.00 for the movement of containers from Savannah and Rincon to Jacksonville.

Attached to Mr. Shaw's affidavit is a document bearing the Shuttle letterhead, dated March 4, 1992, entitled "Rate Schedule A," signed by Mr. Shaw and directed to Mr. Bruno/Aqua Gulf.

---

[2] The court authorized the ICC to consider all issues that it deemed to be relevant in making its determinations.

[3] By decision served February 28, 1996, the Board, pursuant to a letter request filed by Aqua Gulf, directed Shuttle either to file a reply or show cause why this proceeding should not be dismissed and the referring court advised that respondent had not shown itself entitled to collect undercharges. Shuttle did not respond. Rather than summarily dismiss this proceeding, we will dispose of this matter on the basis of the present record.

The document provides for a contract rate of $285 for movements from Savannah and Rincon to Jacksonville.

Mr. Bruno asserts that Aqua Gulf engaged in negotiations with representatives of Shuttle for the procurement of container services in February and March 1992, and that the March 4, 1992 document, referred to in Mr. Shaw's affidavit, reflects the terms of the agreement reached by the parties. Mr. Bruno states that petitioner relied upon the written rate quoted in the March 4, 1992 document in tendering its containerized traffic to Shuttle.

Mr. Damelio is responsible for the review of vendor invoices submitted by carriers doing business with Aqua Gulf. Attached to his statement are relevant portions of the court complaint filed by respondent that list each of the subject undercharge claims by carrier invoice number, date of shipment, originally assessed charge, asserted "corrected" charge, and claimed balance due amount (Attachment A). Also attached to Mr. Damelio's statement are copies of the original invoices issued by Shuttle and the "corrected" invoices setting forth the claimed undercharge due for each of the subject shipments. Each of the original invoices indicates an originally assessed charge of $285.00 and contains a payment date marking. Each of the "corrected" invoices indicates the absence of a tariff authority for the originally applied charge as the basis for the claimed undercharge. Mr. Damelio asserts that the rate Shuttle is here attempting to assess is not a competitive rate and would not have moved the subject container shipments.

DISCUSSION AND CONCLUSIONS

We will dispose of this proceeding under section 2(e) of the NRA. Accordingly, we do not reach the other issues raised.

At the outset, we recognize that the issues raised for our consideration focus primarily on contract carriage, tariff applicability, and rate reasonableness issues. Nevertheless, our use of section 2(e)'s "unreasonable practice" provisions to resolve this matter is fully appropriate. The Board, as a general rule, is not limited to deciding only those issues explicitly referred by a court or raised by the parties. Rather, we may instead decide cases on other grounds within our jurisdiction and, in cases where section 2(e) provides a dispositive resolution, we rely on it rather than the more subjective rate reasonableness and tariff rate provisions. Cf. Amoco Fabrics and Fibers Co. v. Max C. Pope, Trustee of the Estate of A.T.F. Trucking, No. 40526 (ICC served Feb. 26, 1992). Thus, we have jurisdiction to issue a ruling under section 2(e) of the NRA here.

The Ormond Shops, Inc., Thomas J. Lipton, Inc. and Lionel Leisure, Inc. v. Oneida Motor Freight, Inc. Debtor-in-Possession, and Delta Traffic Service, Inc., No. MC-C-30156 (ICC served Apr. 20, 1994); and Have a Portion, Inc. v. Total Transportation, Inc., and Thomas F. Miller, Trustee of the Bankruptcy Estate of Total Transportation, Inc., No. 40640 (ICC served Feb. 7, 1995).

Section 2(e)(1) of the NRA provides, in pertinent part, that "it shall be an unreasonable practice for a motor carrier of property . . . providing transportation subject to the jurisdiction of the [Board] . . . to attempt to charge or to charge for a transportation service . . . the difference between the applicable rate that [was] lawfully in effect pursuant to a [filed] tariff . . . and the negotiated rate for such transportation service . . . if the carrier . . . is no longer transporting property . . . or is transporting property . . . for the purpose of avoiding application of this subsection."[4]

It is undisputed that Shuttle no longer transports property.[5] Accordingly, we may proceed to determine whether Shuttle's attempt to collect undercharges (the difference between the applicable filed tariff rate and the negotiated rate) is an unreasonable practice.

Initially, we must address the threshold issue of whether sufficient written evidence of a negotiated rate agreement exists to make a section 2(e) determination. Section 2(e)(6)(B) defines the term "negotiated rate" as one agreed on by the shipper and carrier "through negotiations pursuant to which no tariff was lawfully and timely filed . . . and for which there is written evidence of such agreement." Thus, section 2(e) cannot be satisfied unless there is written evidence of a negotiated rate agreement.

.

Here, the record contains a written quotation dated March 4, 1992, offering a $285.00 rate for movements from Savannah and Rincon to Jacksonville; a detailed listing indicating an originally assessed charge of $285.00 for each of the subject shipments; and copies of the

original freight invoices issued to petitioner by respondent uniformly applying a $285.00 charge for each of the subject movements. We find this evidence sufficient to satisfy the written evidence requirement. E.A. Miller, Inc.--Rates and Practices of Best, 10 I.C.C.2d 235 (1994). See William J. Hunt, Trustee for Ritter Transportation, Inc. v. Gantrade Corp., C.A. No. H-89-2379 (S.D. Tex. March 31, 1997) (finding that written evidence need not include the original freight bills or any other particular type of evidence, as long as the written evidence submitted establishes that specific amounts were paid that were less than the filed rates and that the rates were agreed upon by the parties).

---

[4] The ICC Termination Act removed the limitation that made section 2(e) of the NRA applicable only to transportation service provided prior to September 30, 1990. 49 U.S.C. 13711(g). Thus, the remedies in section 2(e) may be invoked as to the 53 shipments at issue in this proceeding, all of which have been transported after September 30, 1990.

[5] Shuttle conducted operations as a motor common and contract carrier pursuant to operating authority issued by the ICC in Docket No. MC-171702 and sub numbers thereunder. It sought bankruptcy protection under Chapter 11 of the Bankruptcy Code on November 16, 1992, which, on September 15, 1993, was converted to a Chapter 7 liquidation.

In this case the evidence is substantial that the parties conducted business in accordance with an agreed-to negotiated rate. The consistent application in the original freight invoices of a $285.00 flat rate per shipment conforms with the $285.00 rate quoted in the March 4, 1992 document, confirms the testimony of Mr. Shaw and Mr. Bruno, and reflects the existence of a negotiated rate.

In exercising our jurisdiction under section 2(e)(2), we are directed to consider five factors: (1) whether the shipper was offered a transportation rate by the carrier other than the rate legally on file [section 2(e)(2)(A)]; (2) whether the shipper tendered freight to the carrier in reasonable reliance upon the offered rate [section 2(e)(2)(B)]; (3) whether the carrier did not properly or timely file a tariff providing for such rate or failed to enter into an agreement for contract carriage [section 2(e)(2)(C)]; (4) whether the transportation rate was billed and collected by the carrier [section 2(e)(2)(D)]; and (5) whether the carrier or the party representing such carrier now demands additional payment of a higher rate filed in a tariff [section 2(e)(2)(E].

Here, the evidence establishes that a negotiated rate was offered to Aqua Gulf by Shuttle; that Aqua Gulf, reasonably relying on the offered rate, tendered the subject traffic to Shuttle; that the negotiated rate was billed and collected by Shuttle; and that Shuttle now seeks to collect additional payment based on a higher rate filed in a tariff. Therefore, under 49 U.S.C. 10701(a) and section 2(e) of the NRA, we find that it is an unreasonable practice for Shuttle to attempt to collect undercharges from Aqua Gulf for transporting the shipments at issue in this proceeding.[6]

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. This proceeding is discontinued.

2. This decision is effective on its service date.

3. A copy of this decision will be mailed to:

The Honorable C. Timothy Corcoran, III
United States Bankruptcy Court for the
the Middle District of Florida,

[6] We decline to rule on petitioner's request for a finding pursuant to 49 U.S.C. 11705(d)(3) that it is entitled to an award of costs and reasonable attorney's fees. See General Mills, Inc. --Petition for Declaratory Order, 8 I.C.C.2d 313, 325 (1992) aff'd sub nom. Bankruptcy Estate of United Shipping Co. v. General Mills, Inc., 34 F.3d 1383 (8th Cir. 1994).

No. 41642

Orlando Division
4921 Memorial Highway
Suite 345
Tampa FL 33634

Re: Case No. 92-06601-6C7, Adv. No. 94-329

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary